Lama Tile (Timur) Sdn Bhd v Lim Meng Kwang & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02(NCVC)(W)-735–03 OF 2013
MOHAMAD ARIFF, MAH WENG KWAI AND DAVID WONG JJCA
30 DECEMBER 2014

Companies and Corporations — Directors — Fraud on creditors — Whether director carrying on business with intent to defraud creditors — Claim against company for unpaid judgment sum — Company changing its signboard from LMK Edaran to SLMK Edaran — Chinese characters, facsimile number, telephone number and logo on signboard remaining the same — LMK Edaran to SLMK Edaran two different companies — Business of LMK Edaran transferred to SMLK Edaran after judgment obtained — Respondents common directors and shareholders of LMK Edaran and SLMK Edaran — Whether fraudulent trading established — Whether attempt to defraud creditors shown — Whether corporate veil to be lifted — Companies Act 1965 s 304

Companies and Corporations — Directors — Personal liability — Whether business of company carried on with intent to defraud creditors — Claim against company for unpaid judgment sum — Company changing its signboard from LMK Edaran to SLMK Edaran — Chinese characters, facsimile number, telephone number and logo on signboard remaining the same — LMK Edaran to SLMK Edaran two different companies — Business of LMK Edaran transferred to SMLK Edaran after judgment obtained — Respondents common directors and shareholders of LMK Edaran and SLMK Edaran — Whether fraudulent trading established — Whether attempt to defraud creditors shown — Whether corporate veil to be lifted — Companies Act 1965 s 304

LMK Edaran Sdn Bhd ('LMK Edaran') purchased building materials from the appellant for a sum of RM309.481.20 and failed to pay the purchase price. The appellant thus filed an action in the High Court on 12 October 2005 to recover the sum owing and judgment was entered against LMK Edaran 23 December 2010. Despite the judgment, LMK Edaran failed to settle the indebtedness. Shortly after the letter of demand was sent before filing the writ action, LMK Edaran had changed its company signboard from LMK Edaran to SLMK Edaran around November 2005. The change was done by adding the alphabet 'S' to the signboard in the Romanised script, but the Chinese characters were left unaltered, and similarly the facsimile number, telephone number and the logo. SLMK Edaran was until 5 September 2005, known as Southern Taipan Sdn Bhd. The company searches disclosed that in 2005, LMK Edaran was an active company, with SMKL Edaran being a dormant company, but by 2008,

the position was reversed, and remained as such until 2012. The respondents were previously directors of the appellant from 1984 until 19 June 2005. The respondents were common directors and shareholders of LMK Edaran and SLMK Edaran Sdn Bhd. The appellant filed a writ action against the respondents as defendants seeking remedies under s 304(1) of the Companies Act 1965 ('s 304'). The claim was grounded on fraudulent trading by LMK Edaran and its directors/shareholders (the respondents) by which the appellant, as creditor of LMK Edaran, was defrauded in the sense that after judgment had been obtained against LMK Edaran, the business of LMK Edaran was transferred to SMLK Edaran, leaving SMK Edaran dormant so as to defeat the rights of the appellant as judgment creditor. The respondents were spouses, and at all material times were the only directors and shareholders of both companies. The High Court dismissed the claim on the grounds that: (a) it had no merits, (b) it was barred by res judicata, and (c) it was premature. The appellant appealed against this decision.

Held, allowing the appeal with costs:

(1) It was not the pleaded case of the appellant that the respondents had changed the name of LMK Edaran to SLMK Edaran and therefore defrauded the appellant as creditor. It was expressly pleaded that it was Southern Taipan Sdn Bhd that had its name changed to SLMK Edaran Sdn Bhd. What the appellant pleaded was not so much a name change in the sense, as understood by the High Court, but an attempt to defraud creditors by changing the signboard of LMK Edaran by adding the alphabet 'S' in front of 'LMK', and thereafter rendering LMK Edaran dormant by transferring its business to SLMK (previously Southern Taipan Sdn Bhd) (see para 21).

(2) The High Court had fundamentally misconstrued the appellant's pleaded case, leading to a major error requiring appellate intervention. If the learned trial judge had properly directed his mind to the actual pleaded case, His Lordship would not have so readily concluded that the action was premature, or that it was subject to res judicata (see para 22).

(3) Section 304 is a specific statutory provision which allows the corporate veil to be lifted in the limited situations specified. It is applicable in a situation where in the course of proceedings against a company, it appears that the business of the company has been carried on with intent to defraud creditors, a creditor can make an application to court to request that the court declare that any person who was knowingly a party to such carrying on of the business of the company, to be personally responsible. The evidence in this appeal showed precisely that. The directors and shareholders of LMK Edaran purposely and knowingly engaged in a course of conduct to mislead the appellant (by adding the 'S' to the signboard), and by the same token transferred the business of LMK

Edaran to SMKL Edaran (previously Southern Taipan Sdn Bhd) to render LMK Edaran a dormant company (see para 23).

(4) There was no real issue of res judicata, since the s 304 action is based on a specific and different cause of action provided under company legislation. It is not based on recovery for debt *per se*, but on the personal liability of the persons involved in the fraudulent course of carrying on the business of the company to avoid paying creditors. One could not reasonably conclude that reading the pleaded claim against the directors/shareholders with precision, it was the same or similar with the previous claim against the company (see para 24).

(5) Section 304 deals with dishonest conduct involving real moral blame according to current notions of fair trading among commercial men. The appellant had adduced sufficient evidence of the intention to defraud on a balance of probabilities to justify to conclude that all the requirements of s 304 had been proven on the evidence (see paras 24 & 26).

[Bahasa Malaysia summary

LMK Edaran Sdn Bhd ('LMK Edaran') membeli bahan bangunan daripada perayu dengan jumlah sebanyak RM309,481.20 dan gagal membayar balik harga belian. Oleh itu, perayu memfailkan tindakan di Mahkamah Tinggi pada 12 Oktober 2005 untuk mendapatkan kembali jumlah terhutang dan penghakiman telah dimasukkan terhadap LMK Edaran pada 23 Disember 2010. Walaupun penghakiman dimasukkan, LMK Edaran gagal untuk menyelesaikan keberhutangan. Sejurus selepas surat tuntutan telah dihantar, sebelum tindakan writ difailkan, LMK Edaran telah menukar papan tanda syarikatnnya daripada LMK Edaran kepada SLMK Edaran sekitar November 2005. Pertukaran dibuat dengan menambah huruf 'S' ke atas papan tanda dalam tulisan Rumi, tetapi watak-watak Cina dibiarkan dan tidak diubah, begitu juga dengan nombor faks, nombor telefon dan logo. SLMK Edaran dikenali sebagai Southern Taipan Sdn Bhd sehingga 5 September 2005. Carian syarikat mendedahkan bahawa pada tahun 2005, LMK Edaran adalah sebuah syarikat yang aktif, dengan SMKL Edaran menjadi syarikat yang tidak aktif, tetapi pada tahun 2008, jawatan tersebut telah diterbalikkan, dan kekal sebegitu sehingga 2012. Responden sebelum ini pengarah perayu dari tahun 1984 sehingga 19 Jun 2005. Responden adalah pengarah yang sama dan pemegang saham LMK Edaran dan SLMK Edaran Sdn Bhd. Perayu memfailkan tindakan writ terhadap responden sebagai defendan memohon remedi di bawah s 304(1) Akta Syarikat 1965 ('s 304'). Tuntutan itu berasaskan kepada perdagangan penipuan oleh LMK Edaran dan pengarah/pemegang saham (responden) yang mana perayu, sebagai pemiutang LMK Edaran, telah ditipu dalam erti kata bahawa selepas penghakiman telah diperolehi terhadap LMK Edaran, urusan LMK Edaran telah dipindahkan ke SMLK Edaran, meninggalkan SMK Edaran dorman supaya dapat mengalahkan hak perayu sebagai pemiutang penghakiman. Responden pasangan suami isteri, dan pada

setiap masa material adalah satu-satunya pengarah dan pemegang saham kedua-dua syarikat. Mahkamah Tinggi menolak tuntutan itu dengan alasan bahawa: (a) ia tidak mempunyai merit, (b) ia telah dihalang oleh res judicata, dan (c) ia adalah pra-matang. Perayu merayu terhadap keputusan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Ia bukanlah kes yang diplidkan oleh perayu bahawa responden telah menukar nama LMK Edaran kepada SLMK Edaran dan oleh itu menipu perayu sebagai pemiutang. Ia adalah jelas diplidkan bahawa ia adalah Southern Taipan Sdn Bhd yang telah menukar namanya kepada SLMK Edaran Sdn Bhd. Apa yang diplidkan oleh perayu bukanlah berkaitan dengan pertukaran nama dalam erti kata yang difahami oleh Mahkamah Tinggi, tetapi percubaan untuk menipu pemiutang dengan menukar papan tanda LMK Edaran dengan menambah abjad 'S' di hadapan 'LMK', dan selepas itu menjadikan LMK Edaran dorman dengan memindahkan perniagaannya kepada SLMK (dahulunya dikenali sebagai Southern Taipan Sdn Bhd) (lihat perenggan 21).

(2) Mahkamah Tinggi telah secara dasarnya tersalah anggap kes yang diplidkan oleh perayu, menyebabkan kekhilafan besar yang memerlukan campur tangan rayuan. Jika hakim perbicaraan yang bijaksana telah mengarahkan mindanya dengan wajar kepada kes yang sebenarnya diplidkan, Yang Arif tidak akan begitu mudah untuk menyimpulkan bahawa tindakan adalah pra-matang, atau tertakluk kepada res judicata (lihat perenggan 22).

(3) Seksyen 304 adalah proviso statutori khusus yang membenarkan tirai perbadanan diangkat dalam keadaan terhad yang dinyatakan. Ia terpakai dalam keadaan di mana dalam perjalanan prosiding terhadap syarikat, yang menunjukkan bahawa perniagaan syarikat itu telah dijalankan dengan niat untuk memfraud pemiutang, pemiutang boleh membuat permohonan kepada mahkamah untuk meminta mahkamah mengisytiharkan bahawa mana-mana orang yang merupakan pihak kepada apa-apa yang menjalankan perniagaan syarikat itu, untuk menjadi secara peribadi yang bertanggungjawab. Keterangan dalam rayuan ini menunjukkan perkara itu dengan jelas sekali. Para pengarah dan pemegang saham LMK Edaran sengaja dan dengan mempunyai pengetahuan terlibat dalam perlakuan mengelirukan perayu (dengan menambah 'S' ke papan tanda itu), dan dengan cara yang sama memindahkan urusan LMK Edaran kepada SMKL Edaran (dahulunya Southern Taipan Sdn Bhd) untuk menjadikan LMK Edaran sebuah syarikat dorman (lihat perenggan 23).

(4) Tiada isu sebenar res judicata, kerana tindakan s 304 adalah berdasarkan kepada tujuan yang khusus dan kausa tindakan berbeza yang diperuntukkan di bawah undang-undang syarikat. Ia tidak berdasarkan

pemulihan hutang semata-mata, tetapi pada liabiliti peribadi orang yang terlibat dalam urusan penipuan menjalankan perniagaan syarikat untuk mengelak daripada membayar pemiutang. Seseorang tidak boleh dengan munasabah menyimpulkan bahawa membaca tuntutan itu mengaku terhadap pengarah/pemegang saham dengan tepat, ia adalah yang sama atau serupa dengan dakwaan sebelum ini terhadap syarikat itu (lihat perenggan 24).

(5) Seksyen 304 memperkatakan bahawa perlakuan tidak jujur yang melibatkan kesalahan moral sebenar mengikut tanggapan semasa perdagangan adil dalam kalangan orang-orang komersial. Perayu telah mengemukakan keterangan yang mencukupi mengenai niat untuk memfraud atas imbangan kebarangkalian untuk membenarkan untuk membuat kesimpulan bahawa semua keperluan s 304 telah terbukti atas keterangan itu (lihat perenggan 24 & 26).]

Notes

For cases on fraud on creditors, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 311–312.

For cases on personal liability, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 357–371.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuan & Ors and another appeal [1995] 2 MLJ 770, CA (refd)

LMW Electronics Pte Ltd v Ang Chuang Juay & Ors [2010] 1 MLJ 185; [2010] 4 CLJ 849, HC (refd)

Siow Yoon Keong v H Rosen Engineering BV [2003] 4 MLJ 569; [2003] 4 CLJ 68, CA (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395; [1996] 4 CLJ 545, CA (refd)

Legislation referred to

Companies Act 1965 s 304(1)

Appeal from: Suit No MT1–22-NCVC-35–03 of 2013 (High Court, Kota Bahru)

Brian Cumming (YJ Yap with him) (Gideon Tan Razali Zaini) for the appellant.
Elzubaiyah Meriam Nor bt Mohd Yusoff (Yusof Nor & Co) for the respondent.

Mohamad Ariff JCA:

[1] In this appeal, the appellant was the plaintiff in the High Court. The appellant filed a writ action against the respondents as defendants seeking

remedies under s 304(1) of the Companies Act 1965 ('the Act'). The High Court dismissed the claim.

[2] The respondents were common directors and shareholders of two companies namely LMK Edaran Sdn Bhd and SLMK Edaran Sdn Bhd (hereafter, 'LMK Edaran' and 'SLMK Edaran'). In essence, the claim was grounded on fraudulent trading by LMK Edaran and its directors/shareholders (the respondents) by which the plaintiff, as creditor of LMK Edaran, was defrauded in the sense that after judgment had been obtained against LMK Edaran, the business of LMK Edaran was transferred to SMLK Edaran, leaving SMK Edaran dormant so as to defeat the rights of the appellant as judgment creditor. The respondents are spouses, and at all material times were the only directors and shareholders of both companies.

[3] The appeal was allowed with costs, since it was clear that there was sufficient material evidence on the record to prove fraudulent trading within the meaning of s 304 of the Act. The judgment of the High Court dismissing the claim was set aside, and it was ordered that judgment be entered as prayed in para 22(c) of the statement of claim. We were of the opinion that the High Court had misdirected itself on the pleaded case of the appellant as the plaintiff, and further, had misdirected itself on the applicable law as well as failed to properly evaluate and appreciate the evidence before the court which showed a patently clear case of an intention to defraud the plaintiff as creditor of LMK Edaran.

[4] The underlying facts are straightforward and can be stated very briefly. LMK Edaran was a purchaser of building materials from the appellant. Upon LMK Edaran's request, the appellant delivered a quantity of tiles and marble between the months of October 2004 and April 2005, which were acknowledged as having been delivered and received by LMK Edaran in good condition. As pleaded in para [8] of the statement of claim, the total cost of these materials supplied over that period was RM309.481.20. None of the delivered items was paid for by LMK Edaran, with the result that as at 30 April 2005, the accumulated interest came to RM6,576.22, giving a total indebtedness of RM316.057.42.

[5] The appellant demanded payment without success, leading it to file an action in the High Court, Kota Bharu to recover the sum owing. Judgment was entered against LMK Edaran for this sum in that writ action (Writ Summons No 22–91 of 2005). That suit was commenced on 12 October 2005. The judgment against LMK Edaran was allowed by the High Court on 23 December 2010.

[6] It was common ground that the sealed judgment was not served on LMK

Edaran. Despite securing the judgment, LMK Edaran failed to settle the indebtedness.

[7] The facts also disclosed that shortly after the letter of demand was sent before filing the writ action, LMK Edaran had changed its company signboard from LMK Edaran to SLMK Edaran. This was done around November 2005, the information being supplied by LMK Edaran's customers itself to the appellant. The change was done by adding the alphabet 'S' to the signboard in the Romanised script, but the Chinese characters were left unaltered, and similarly the facsimile number, telephone number and the logo.

[8] It was not in dispute that SLMK Edaran was formerly known as Southern Taipan Sdn Bhd and incorporated on 13 May 1996. The name change to SLMK Edaran was done only on 5 September 2005, that is, about more than two months after the appellant sent the letter of demand to LMK Edaran.

[9] It is also not in dispute that the company searches disclosed that in 2005, LMK Edaran was an active company, with SMKL Edaran being a dormant company, but by 2008, the position was reversed, and remained as such until 2012, the date of the latest company search done before this present writ action was filed.

[10] The respondents were also previously directors of the appellant from 1984 until 19 June 2005, who were not re-elected as directors in 2005 because the relationship between the respondents and other members of the board of the appellant had turned sour. The first respondent (the husband) was in fact an executive director of the appellant.

[11] The indebtedness owing by LMK Edaran remained unpaid at all material times.

[12] In these circumstances, the appellant filed the present writ action, the subject matter of this appeal, relying on s 304(1) of the Act, which reads:

> If in the course of the winding up of a company or *in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company* or creditors of any other person or *for any fraudulent purpose, the Court on the application of* the liquidator or *any creditor* or contributory *of the company, may, if it thinks proper so to do, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, or without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.*

[13] We underscore the relevant wording of this provision, particularly the

use of the formula if '*it appears* that any business of the company has been carried on *with intent to defraud creditors* of the company'. A

[14] The summary of the appellant's claim is expressed in counsel's written submission before us: B

> In brief, the Appellant's case against the Respondents in this suit is that the 1st and 2nd Respondents have intentionally defrauded the appellant (creditor) by transferring out the assets and business from their company, LMK Edaran Sdn Bhd to SLMK Edaran, another company controlled by them in order to prevent the debt owed by LMK Edaran Sdn Bhd to the Appellant. C

[15] As indicated earlier, the High Court dismissed the claim. Three broad grounds appear from the High Court judgment, which we quote below:

> Setelah meneliti keseluruhan keterangan yang dikemukakan dan menimbang hujahan peguamcara yang terpelajar, saya mendapati plaintif gagal membuktikan samada tuntutan utama ataupun tuntutan alternative terhadap defendan. Berdasarkan alasan di atas saya mendapati tuntutan plaintif adalah tidak bermerit, res judicata dan adalah pra matang. Oleh itu, atas imbangan keberangkalian, saya menolak tuntutan plaintif bagi Perintah Deklarasi di bawah seksyen 304 Akta Syarikat 1965 gagal dibuktikan ... D E

[16] As this passage makes apparent, the High Court dismissed the appellant's claim because (a) it had no merits, (b) it was barred by res judicata, and (c) it was premature. The learned trial judge, in analysing the pleaded case of the appellant, found that the appellant had pleaded that LMK had changed its name to SLMK and had transferred its business and indebtedness to SMLK with the fraudulent intention to defeat the appellant's judgment debt. When referring to the respondents' defence, the learned trial judge said: F G

> Keterangan defendan diberikan melalui defendan sendiri (SD1 dan SD2), Secara ringkasnya defendan menafikan telah menukar nama syahkat dari LMK kepada SLMK. Mereka juga manafikan telah bertindak dengan niat untuk menipu pemiutang dan plaintif. Berhubung jumlah RM309,418.20 yang dituntut, defendan mendakwa ianya telah diputuskan secara muktamad oleh Mahkamah dalam kes Writ Saman No. 22–91 Tahun 2005 dan dengan itu tindakan plaintif adalah res judicata. H

[17] The High Court then proceeded to stipulate the issues for decision in the following manner: I

> Berdasarkan kertas kausa serta keterangan yang diberikan secara naratif isu-isu utama yang perlu diputuskan adalah:
>
> (i) Adakah defendan menukar nama syarikat dan LMK Edaran Sdn Bhd kepada SMLK Edaran Sdn Bhd?

(ii) Jika ada penukaran, adakah penukaran nama tersebut, dilakukan dengan tujuan untuk menipu pemiutang atau plaintif?

(iii) Adakah berdasarkan fakta kes ini, peruntukan seksyen 304 Akta Syarikat 1965 terpakai?

(iv) Adakah defendan secara bersama atau berasingan bertanggungan membayar plaintif jumlah RM309,418.20?

(v) Adakah tindakan plaintif res judicata?

[18] Based on the trial judge's understanding of the pleaded case and the issues, it was apparent His Lordship believed the appellant's/plaintiff's claim rested on the all-important question whether the respondents/defendants had changed the name of LMK Edaran to SMLK Edaran, and this led the High Court to conclude that the company search tendered during trial (exh D3) showed otherwise, namely the company that had the name change was Southern Taipan Sdn Bhd, and the change was done in accordance with legal procedure and with the approval of the Registrar of Companies. The High Court went on to conclude that there was no evidence that the change was effected with mala fide intent. We quote below the relevant excerpt from the judgment:

> Dalam pliding mereka plaintif di perenggan 17 pernyataan tuntutan adalah amat jelas di mana defendan didakwa plaintif dengan niat yang curang bertujuan menipu pemiutang dan plaintif telah menukar nama syarikat LMK kepada SLMK. Pliding tersebut tidak pernah dipinda. Oleh itu plaintif adalah terikat dengan pengataan dalam pliding mereka tersebut iaitu, plaintif perlu membuktikan bahawa defendan telah menukar syarikat LMK kepada SLMK.
>
> Bagi isu pertama di atas saya mendapati keterangan yang dikemukakan gagal membuktikan apa yang didakwa oleh plaintif ...
>
> Apa yang dilakukan oleh defendan adalah menukar nama syarikat Southern Taipan Sdn Bhd kepada SMLK Edaran Sdn Bhd. Plaintif tidak membuktikan penukaran nama tersebut dilakukan untuk menipu pemiutang ...
>
> Berdasarkan dapatan saya ... isu kedua pada hemat saya menjadi akademik kerana isu kedua bergantung kepada dapatan bahawa sememangnya defendan telah menukar nama syarikat LMK kepada SLMK ...
>
> Akta Syarikat 1965 membenarkan nama suatu syarikat ditukar dengan kelulusan Pendaftar Syarikat ...

[19] Aside from the above findings, the High Court also questioned why there was no police report lodged by the appellant if its claim was based on it being defrauded by the respondents. Further, the High Court, noting that no sealed copy of the earlier judgment had been served on LMK, concluded the claim under s 304 was premature, asking the question: 'Oleh itu bagaimanakah defendan boleh dikatakan cuba mengelak dari membayar jumlah

penghakiman melalui cara menukar nama syarikat tersebut?'. Lastly, the court applied the doctrine of res judicata by concluding the second writ action was based on the same earlier claim, and therefore the same cause of action, against LMK.

[20] In the submissions before us, the appellant summarised its grounds for the appeal as follows:

(a) The learned trial judge misunderstood the appellant's cause of action under s 304, ie by misunderstanding the pleaded case and stating that the respondents changed the company name of LMK Edaran to SLMK Edaran with the intention to defraud creditors and the appellant;

(b) The trial judge erred in ruling that no police report had been lodged by the appellant against the respondents on the name change and therefore there was no element of cheating proven;

(c) The trial judge erred in ruling that the sealed copy of the earlier judgment had first to be served on LMK Edaran before action under s 304 could be commenced against the respondents; and

(d) The trial judge erred in finding that res judicata applied.

[21] We found the appellant's submissions on these grounds had compelling merits. We found there was a fundamental misdirection in the High Court's finding on the appellant's pleaded case. On a proper reading of the statement of claim, with respect, it was not the pleaded case of the appellant that the respondents had changed the name of LMK Edaran to SLMK Edaran and therefore defrauded the appellant as creditor. It was expressly pleaded that it was Southern Taipan Sdn Bhd that had its name changed to SLMK Edaran Sdn Bhd. What the appellant pleaded was not so much a name change in the sense understood by the High Court, but an attempt to defraud creditors by changing the signboard of LMK Edaran by adding the alphabet 'S' in front of 'SMK'. and thereafter rendering LMK Edaran dormant by transferring its business to SLMK (previously Southern Taipan Sdn Bhd). See paras 10 to 21 of the statement of claim, particularly paras 19 to 21:

> 19. The SLMK EDARAN, has changed its previous name of Southern Taipan Sdn Bhd, to its current name on 5.9.2005, ie after the plaintiff has served on the LMK EDARAN, its letter of demand dated 12.6.2005 to demand for the outstanding sum as mentioned here at paragraph 9.
>
> 20. Neither did the defendants take the liberty to inform the plaintiff of the change of name of the companies.
>
> 21. In view of the above, the plaintiff contends and will contend that the defendants:
>
> Particulars of wrongful trading

(i) Have been knowingly involved in carrying on of the business with intent to defraud creditors of the LMK Edaran Sdn Bhd;

(ii) Has engaged with wrongful trading and with intend to defraud the creditors;

(iii) At the material times, the said Directors were knowingly a party to the carrying on of the business of the LMK Edaran Sdn Bhd with the intent to defraud its creditors including the plaintiff;

(iv) Despite knowing the increasing debts owed to the plaintiff, the 1st and 2nd Defendants, being the Directors for the LMK Edaran Sdn Bhd, when demanded for payments at that material time did not have good reasons to believe that funds would be available to pay its creditors including plaintiff for the goods sold and delivered as and when those debts became due;

(v) But nevertheless continue to mislead the plaintiff into believing that LMK Edaran Sdn Bhd are still financially strong;

(vi) The 1st and 2nd defendants, jointly and severally, wrongfully with the intent to injure the plaintiff and/or to cause loss to the plaintiff by unlawful means, conspired and combined together to defraud the plaintiff and to thereafter conceal such fraud;

(vii) The 1 and 2 defendants, jointly and severally, wrongfully and conveniently changed the name from LMK Edaran to SMLK Edaran to avoid its responsibility to pay the outstanding and not reasonable prospect (sic) of the plaintiff ever receiving payment of the outstanding sum.'

[22] A reading of these paragraphs will show clearly the High Court had fundamentally misconstrued the appellant's pleaded case, leading to a major error requiring our appellate intervention. Thus, if the learned trial judge had properly directed his mind to the actual pleaded case, we believe His Lordship would not have so readily concluded that the action was premature, or that it was subject to res judicata. Whether or not the action was premature depended on a combination of relevant facts in light of s 304 of the Act.

[23] Section 304 is a specific statutory provision which allows the corporate veil to be lifted in the limited situations specified. Earlier in this judgment we have underlined that it is applicable in a situation where in the course of proceedings against a company, it appears that the business of the company has been carried on with intent to defraud creditors, a creditor can make an application to court to request that the court declare that any person who was knowingly a party to such carrying on of the business of the company, to be personally responsible. The evidence in this appeal showed precisely that. The directors and shareholders of LMK Edaran purposely and knowingly engaged in a course of conduct to mislead the appellant (by adding the 'S' to the signboard), and by the same token transferred the business of LMK Edaran to SMKL Edaran (previously Southern Taipan Sdn Bhd) to render LMK Edaran

a dormant company. The witness for the appellant (SP1; Jeremy KH Chin, a Director of the appellant) indeed testified that the first respondent himself told him that they had transferred the business from LMK Edaran to SLMK Edaran to avoid payment of the debt owing. This evidence remained unchallenged throughout the trial. Counsel for the respondents failed to put the respondents' case directly to SP1 to challenge or rebut this evidence, and we agreed with the appellant's submission that this evidence must be deemed admitted on the strength of the case-authorities, such as *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuan & Ors and another appeal* [1995] 2 MLJ 770 and *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545. Counsel for the appellant highlighted the following relevant part of SP1's testimony which proved the requisite intention under s 304:

> Q: Now I have one supplementary question here ... Now Jeremy, can you tell the Court, did the defendant, 1st or 2nd defendant inform you of the reasons as to why they transferred the assets and business over?
>
> A: Yes, the 1st defendant actually told me that after they had transferred from LMK Edaran to SLMK Edaran our company cannot do anything from collecting the debts that incurred (sic) when the time he's the Executive Director of the Company. (p 84, Appeal Record, Vol. 2(1))

[24] On the facts of this appeal, there was no real issue of res judicata, since the s 304 action is based on a specific and different cause of action provided under company legislation. It is not based on recovery for debt *per se*, but on the personal liability of the persons involved in the fraudulent course of carrying on the business of the company to avoid paying creditors. One cannot reasonably conclude that reading the pleaded claim against the directors/shareholders with precision, it is the same or similar with the previous claim against the company. Section 304 deals with dishonest conduct involving real moral blame according to current notions of fair trading among commercial men (*Siow Yoon Keong v H Rosen Engineering BV* [2003] 4 MLJ 569; [2003] 4 CLJ 68).

[25] The Court of Appeal in *Siow Yoon Keong v H Rosen Engineering BV*, has also clarified that within the context of s 304, a lower degree of proof is required to prove the fraudulent conduct: 'Note that the section only uses the 'if it appears' which indicates a lower degree of proof is required' (p 80 of the report). See also *LMW Electronics Pte Ltd v Ang Chuang Juay & Ors* [2010] 1 MLJ 185; [2010] 4 CLJ 849, where the court also held that a lower degree of proof was required, and it is necessary only to prove an 'intention' to defraud.

[26] On the facts of this present appeal therefore, we were of the opinion that the appellant had adduced sufficient evidence of the intention to defraud on a balance of probabilities to justify us to conclude that all the requirements of s 304 had been proven on the evidence. Indeed, even on the higher standard of

proof, we would conclude the claim against the respondent could have been also established.

[27] Reverting to the issue of the claim being premature, this was an issue without merit. There was obviously no doubt that the earlier judgment was pronounced in court, and it would have force and validity as of that date of pronouncement. Equally obvious, if the appellant was minded to enforce that judgment against the company, it would have to extract the sealed judgment and serve on LMK Edaran, now masquerading as SLMK Edaran, but the appellant has also elected to proceed against the respondents under s 304. That is an independent cause of action founded on morally blameworthy conduct on their part that law and policy should not leave unremedied among commercial men. It will create an undesirable precedent if this type of conduct is not corrected by the courts.

[28] We therefore allowed the appeal and ordered that judgment be entered for the appellant as prayed in para 22(c) of the statement of claim.

[29] The judgment of the High Court was set aside. Costs of RM40,000 here and below was awarded to the appellant. The deposit was ordered to be refunded.

Appeal allowed with costs.

Reported by Kanesh Sundrum